

To commence the statutory time for appeals as of right (CPLR 551310 , you are advised to serve a copy of this order, with notice of entry, upon all parties

51JPREIVIE COURT OF THE STATE OF NEW YORK
COUNTY OF ROCICLAND
Present: EON. BRUCE E. TOLBERT
J.S.C.

In the Matter of the Application of THE VILLAGE OF
HAVBRSTRAW to acquire title to certain real property
located in the Village of Haverstraw, Rockland County,
State of New York, and designated on the Tax Maps
of the Village of Haveratraw as Section 27.62, Block 2, Lot
13.

Executive Touch Landscaping & Construction, LLC,

Claimant,

-against-

The Village of Haverstraw,

Condemnor.

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TOLBERT, J.

STLED AND ENTERED

Time , 2014

ROCICGAND COUNTY CLERK

DECISION AND ORDER
Index No.: 1843/06

The following submissions were considered in determining this motion:

DOCUMENTS NUMBERED

- | | |
|--|---------|
| 1. Notice of Motion dated May 8, 2014 | 1 - 8 |
| 2. Condemnor's Memorandum of Law in Opposition, etc. | 9 - 10 |
| 3. Reply Dated May 21, 2014 | 11 - 17 |

Based upon the submissions and argument the instant motion is determined as follows:

The instant matter is on trial, non-jury, in a bifurcated manner seeking just compensation damages resulting from the appropriation of certain property through condemnation under Article 5 of the Eminent Domain Procedure Law. The presentation of evidence and testimony on the value of and appropriate damages to be awarded as just compensation relating to the fee has been completed, awaiting post-trial submissions.

The trial relating to the just compensation as damages due Claimant for fixtures is in progress. Claimant has presented its direct case and Condemnor is in the process of presenting its case. Condemnor called its expert witness/fixture appraiser and sought to have him certified as an expert. Over objection of Claimant, the Court so certified the proffered individual as an expert in fixture appraisals. When Condemnor proffered, after adequate foundation was laid, the conformed appraisal report into evidence, Claimant after *voir dire*, objected to its admission, arguing that the conformed report was defective and deficient. Not solely, but primarily, Claimant bases its objection to the introduction of the conformed appraisal on the fact that said report purports to value the various fixtures as of April 2012, almost six years after the date of title vesting of July 26, 2006. Therefore, Claimant argues, the values found by Condemnor's appraisal report are not relevant to or probative on the question before the Court; to wit, the value of compensable fixtures as of date of vesting.

Claimant also argues that Condemnor's appraisal does not comply with the requirements of Court rules governing appraisal reports in condemnation proceedings.

Condemnor raises various arguments why the objection should be overruled.

Initially, it must be noted that neither side makes compelling arguments as to the timely filing and exchange of appraisal reports. There is no evidence or argument that suggests that the title vesting date was other than July 26, 2006. Indeed, Condemnor's appraisals certification letter contained within the appraisal, clearly sets forth the date of title vesting as July 26, 2006 and its estimates of values for the various fixtures are established as of the date of April 2012. To the extent necessary, this Court determines that the title vesting date was in fact July 26, 2006, and the Court's obligation is to determine just compensation (in part the values of the various fixtures) as of the date of appropriation or title vesting date. See *Jackson v. State of New York*, 213 NY 34(1914).

It would appear that Condemnor adopted a theory that although the title passed from Condemnor to Condemnee on July 26, 2006 through the appropriation, they should present to the Court for its consideration, values as of a date nearly six years post title vesting; April 2012. This does not appear to be an inadvertent or typographical error, but an adopted theory based upon a state of facts that the Claimant remained on the property after title vesting. While these facts may be accurate, Condemnor has not presented any authority that would dictate that value be determined as of a date other than the title vesting date.

Condemnor cites to *Eckerd Corp v. Burin*, 83 AD 3d 1239, 920 N.Y.S. 2d 824 for the proposition that there may be circumstances when an appraisal need not be stricken due to valuation as of an incorrect date. However, in that case the difference in dates was a mere six months. There was evidence that the difference in values through comparable sales had not changed significantly over the six months. The latter fact was agreed to by the other side in that case. Thus, that Court reasoned that there was no deviation from conclusions reached using the incorrect date and those reached using the correct date leading to the conclusion that there was no prejudice.

In the case at bar, six years have elapsed and there is certainly no indication that values may have remained similar or that Claimant in this case would not suffer prejudice. In addition, it must be reiterated that it appears that Condemnor chose to use the April 2012 date for valuation purposes. Under these facts, the Condemnor's reliance on *Ecicard*, *supra* is unpersuasive.

Based upon the foregoing, the Court determines that the objection to the introduction of Condemnor's exchanged appraisal report is sustained to the extent that all conclusions as to value of the various fixtures are stricken and Condemnor's offering of testimony thereon is precluded.

Moreover, this Court determines that Condemnor's appraisal shall be admitted, limited to the issue of identity of fixtures as compensable trade fixtures or personalty. Such questions, it has been determined, are mixed questions of law and fact. Claimant has offered its evidence on that subject primarily through its expert, and Claimant will be afforded the opportunity to present evidence on that subject, through its expert.

Claimant raises other legal arguments i.e., alleged non-compliance by Condemnor appraiser with Court rules. While the arguments may have some merit, the Court finds that under the facts and circumstances of this case, relief beyond what this Court has hereinabove determined is not warranted at this juncture.

Similarly, Condemnor's argument that the instant objection was improperly brought (i.e, not before trial) and that such should be precluded pursuant to the doctrine of "Law of the Case", based upon the Court's denial of motions in limine made prior to taking testimony, is deemed irrelevant by this Court in the case at bar.

Therefore, based upon the foregoing it is hereby

ORDERED, that the conformed appraisal report (Exhibit L for identification) shall be admitted into evidence on the limited issue of the identification of purported fixtures as compensable trade fixtures or personalty; and it is hereby further

ORDERED, that Condemnor's expert can offer testimony on that limited issue consistent with the conformed appraisal report (Exhibit L); and it is hereby further

ORDERED, that the contents of said conformed appraisal that purport to place values on the various fixtures and "soft costs" and expert testimony in that regard are precluded.

ORDERED, that counsel and witness shall appear before this Court for the purpose of continuing trial to conclusion on a date to be determined.

The foregoing shall constitute and be the Decision and Order of this Court.

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Honorable Bruce E. Tolbert
Justice of the Supreme Court

Dated: May..0, 2014
White Plains, New York

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